MAGNUM FINANCE BHD. v. LING SING PING

[O.C.J. (Siti Norma Yaakob J.) 24 February 1988]

[Kuala Lumpur – Originating Summons No. F31-2312-86]

Agency – Power of attorney – Land charged by virtue of power of attorney – Whether powers exercised within the authority given.

The defendant's attorney, one Ban Hong Keong, charged the defendant's property to the plaintiff as security for the granting of a loan to a developer, Syarikat Hup Aik Realty Sdn. Bhd. The authority to charge the defendant's property was given by the defendant by virtue of a power of attorney. The power to charge was for the purpose of carrying into effect the terms and conditions of a joint venture agreement entered into between the defendant and the developer.

In the present foreclosure proceedings, the defendant alleged that the charge was executed by Ban without his knowledge and in excess of his authority as an attorney and for purposes which were in no way connected to the agreement.

Held: (1) when construing a power of attorney, general words need to be viewed in the light of the stated objects of the power of attorney which in this case were clearly outlined in the recitals limiting the exercise of Ban's powers in carrying out the terms and conditions of the agreement;

(2) when approving the loan to the developer and accepting the charged documents executed by Ban, the plaintiff did not bother to look at the agreement and neither was it concerned with the legal construction of the power of attorney and it cannot therefore now disclaim knowledge of the agreement nor the legal construction of the power of attorney;

(3) as the charge created was a third party charge, the plaintiff owed a duty to at least inquire into the circumstances surrounding the execution of the power of attorney, the purpose of its execution and the limitations imposed on it by law.

Cases referred to:

(1) *Danby* v. *Coutts & Co.* (1885) 29 Ch.D. 500 (consd).

ORIGINATING SUMMONS.

Y.C. Chen for the plaintiff.

W.S.W. Davidson for the defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J.: From these foreclosure proceedings, it is clear that the authority to charge the defendant's property to the plaintiff as security for the granting of a bridging loan of $1.4 million to Syarikat Hup Aik Realty Sdn. Bhd. (the developer) was exercised by the defendant's attorney, Ban Hong Keong (Ban), the managing director of the developer, pursuant to a power of attorney dated 25 July 1979. Clause 6 of the power of attorney authorizes Ban to charge the defendant's property, but I consider that the power to do so must be read in its context in the power of attorney to determine the limitations of such power.

From the recitals it would appear that the power to charge is limited to carrying into effect the terms and conditions of a joint venture agreement (the agreement) entered into between the defendant and the developer. Under the terms and conditions of the agreement executed the same day as the power of attorney, the defendant surrendered his property to the developer for the purpose of developing it into a housing estate and under clause 9 of the agreement, the defendant was entitled to 30% of every class of buildings to be constructed on his land, the costs for which would be borne by the developer with the remaining 70% going to the developer.

It is also clear from clause 3 of the agreement that the power of attorney was executed for the sole purpose of facilitating the operations of the agreement and under clause 21 of the agreement, the power to charge the property is limited to the developer's lots which can only be ascertained after sub-division.

From the various affidavits, it is also disclosed that Ban, acting under the power of attorney, created three charges over the defendant's property, the first on 9 October 1979 in favour of Chartered Bank, the second on 30 September 1981 in favour of Public Bank and the third on 28 April 1984 in favour of the plaintiff. The defendant alleges that all three charges were executed by Ban without his knowledge and in excess of his authority as an attorney and for purposes which are in no way connected to the agreement.

To begin with, the first charge was an additional third party security for moneys owed by the developer to Chartered Bank to the extent of $250,000. So, too, was the second charge which was to secure repayment of $500,000 owed by the developer to Public Bank. As for the third charge, the defendant has deposed that out of the $1.4 million bridging loan disbursed by the plaintiff, $1 million was utilized by Ban to redeem the defendant's property from Public Bank together with Ban's own property for which he had no authority to do under the power of attorney. The balance

of $400,000 was expended as payments for works done by the developer at the housing estate based on certificates issued by the developer's own consultant engineers for sums which the defendant alleges had been highly inflated as the works which were in fact done did not commensurate with the payments made. This is evidenced by the plaintiff's letter dated 19 March 1984 approving the bridging loan and the affidavits from the two contractors who did the works at the site.

All these are in no way disputed by the plaintiff but when resisting the defendant's objections to the sale of his charged property, the plaintiff had submitted that it owes no duty of care to the defendant to inquire into Ban's authority under the power of attorney, as on the face of it, the power to charge has been expressly stated in clause 6. This is so but when interpreting the powers given in a power of attorney, *Bowstead on Agency*, 13th Ed. at p. 65 stresses that "powers of attorney must be strictly construed, and are interpreted as giving only such authority as they confer expressly or by necessary implication". The author goes further to lay down the following as being the most important rules when construing a power of attorney:

"(a) The operative part of a deed is controlled by the recitals where there is ambiguity.

(b) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

(c) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose.

(d) The deed must be construed so as to include all incidental powers necessary for its effective execution."

In *Danby* v. *Coutts & Co.*[1] the above principles of construction were followed when the operative part of a power of attorney appointed X and Y to be the attorneys of the plaintiff in that case, without terms limiting the duration of their powers, but it was preceded by a recital that the plaintiff was going abroad and was desirous of appointing attorneys to act for him during his absence. It was held that the recital controlled the generality of the operative part of the instrument and limited the exercise of the powers of the attorneys to the period of the plaintiff's absence from England. Thus a charge created by the attorneys during the plaintiff's absence was held to be valid but not the charge given after his return.

A number of other authorities were also cited before me and it is clear from these authorities that when construing a power of attorney, general words need to be viewed in the light of the stated objects of the power of attorney which in this case are clearly outlined in the recitals limiting the exercise of Ban's powers in carrying out the terms and conditions of the agreement. I can only conclude that when approving the loan to the developer and accepting the charged documents executed by Ban, the plaintiff did not bother to look at the agreement and neither was it concerned with the legal construction of the power of attorney and it cannot therefore now disclaim knowledge of the agreement nor the legal construction of the power of attorney. As the charge created is a third party charge, the plaintiff owes a duty to at least inquire into the circumstances surrounding the execution of the power of attorney, the purpose of its execution and the limitations imposed on it by law.

The defendant has since filed a civil suit against the developer, Ban and the plaintiff alleging, *inter alia*, fraud and excess of authority in the creation of the charge and praying that the plaintiff discharge the charge as being null and void, the very same issues now raised in these proceedings before me. Since it is undesirable to have a situation where the same issues arising between the same parties relating to the same subject matter are repeated in two separate actions and since such issues can only be determined by oral evidence which can be more appropriately done in the civil suit, I had refrained from making an order of sale in this originating summons but, instead, ordered that these foreclosure proceedings be stayed pending the determination of the civil suit and I also direct that once pleadings have closed in the civil suit, an early date of hearing be fixed so that the plaintiff's cause of action, if any, in this originating summons will not be unduly delayed. In any event, I had also ordered that the costs in this originating summons be costs in the cause.

Order accordingly.

Solicitors: *Allen & Gledhill; Azman Davidson & Co.*